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No. 91-216

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

PHILLIP MATTHEWS, PETITIONER

v.

GREENEVILLE LIGHT AND POWER SYSTEM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT TENNESSEE VALLEY AUTHORITY IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a non-party to a contract under which the Tennessee Valley Authority sells electric power to a municipal distributor of that power may obtain judicial review, under the Administrative Procedure Act, of the resale rates prescribed by the contract or of an alleged failure by TVA to enforce certain terms of the contract.

2. Whether the non-party may pursue an action against TVA on the theory that he is a third-party beneficiary of the contract.

3. Whether the district court had federal question jurisdiction over contract claims asserted by the non-party against the municipal distributor, its governing board, and two of its officers.

4. Whether the district court abused its discretion when it ruled on motions for summary judgment without first allowing petitioner to take certain discovery.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. Axxiv-Axliv) is unpublished, but the decision is noted at 932 F.2d 968 (Table). The pertinent opinions of the district court (Pet. App. Aiii-Axviii, Axx-Axxiii) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1991. The petition for a writ of certiorari was filed on July 30, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

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[1] The following respondents are not identified in the caption: the Tennessee Valley Authority; the Town of Greene-

STATEMENT

1.a. In accordance with the Tennessee Valley Authority Act of 1933 (TVA Act), 16 U.S.C. 831-831dd, the Tennessee Valley Authority produces and sells electric power at wholesale to 160 municipal and cooperative distributors. The power is resold to millions of residential, commercial, industrial, and governmental users. See *Tennessee Elec. Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118 (1939); Pet. App. xxiv. The City of Greeneville, Tennessee, has been a municipal distributor of TVA power since 1945. C.A. App. 41, 114.

The TVA Act includes a broad policy statement regarding sales of TVA power. The statute declares, *inter alia*, that TVA projects (16 U.S.C. 831j):

> shall be considered primarily as for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity.
> * * *

To advance those policies and other purposes of the TVA Act, TVA "is authorized to include in any contract for the sale of power such terms and condi-

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ville, Tennessee; Robert Lay, manager of the Greeneville Light and Power System (GLPS); Norman Williamson, acting GLPS Superintendent; and Charles Worley, Jess Musick, Paul Hite, and J.E. Bullen, members of the GLPS Board of Public Utilities.

tions, including resale rate schedules, * * * as in its judgment may be necessary or desirable for carrying out the purposes of" the Act. 16 U.S.C. 831i. Pursuant to that provision, TVA's contracts with Greeneville and other distributors contain resale rate schedules specifying the rates at which the power will be resold to the distributors' retail customers. Although TVA charges the same wholesale rates to each of the 160 distributors of its power, TVA chooses from among a number of alternative resale rate schedules when it contracts with a distributor. (In 1985, when TVA and Greeneville entered into their most recent contract, there were 20 retail rate schedules for residential service and the same number for general power.) C.A. App. 114-115.

The choice of the appropriate resale rate schedule for a particular distributor is the subject of discussions between TVA and the distributor. In making its judgment as to the appropriate schedule, TVA takes into account a number of factors, including the distributor's anticipated revenues and expenses, actual and projected capital additions to the electric system, the system's need for working capital, and existing and proposed borrowings. C.A. App. 114-115.

TVA's most recent contract with Greeneville took effect in 1985. Under that contract, Greeneville's resale rates were reduced one level lower than those prescribed by the prior contract, but were higher than TVA had initially recommended. The higher rate schedule was chosen when Greeneville indicated that anticipated capital additions to its system and its desire to reduce outstanding debt made the reductions sought by TVA unfeasible. C.A. App. 116-117.

In accordance with the TVA Act, 16 U.S.C. 831i, Greeneville's contract requires it to operate on a nonprofit basis. The contract provides that if the resale rates in the contract "provide revenues that are more than sufficient" to operate Greeneville's system "on a self-supporting and financially sound basis," then TVA and Greeneville "shall agree upon a reduction in said rates and charges, and [Greeneville] shall promptly put such reduced rates and charges into effect." Similarly, a provision obligating Greeneville to use its revenues to pay for operating expenses, debt service, new construction, and other purposes benefiting the system provides that "resale rates and charges shall be reduced from time to time to the lowest practicable levels considering such factors as future circumstances affecting the probable level of earnings, the need or desirability of financing a reasonable share of new construction from * * * surplus revenues, and fluctuations in debt service requirements." C.A. App. 41-43.

TVA regularly monitors the financial performance of its distributors. To facilitate that oversight, Greeneville's contract requires it to "keep the general books of accounts of the electric system according to the Federal Energy Regulatory Commission Uniform System of Accounts." Greeneville is also obligated to supply TVA with annual financial reports and to have its financial statements examined by independent certified public accountants in accordance with generally accepted auditing standards. Finally, the Greeneville contract guarantees TVA access to Greeneville's books and records. TVA field accountants review Greeneville's annual reports and independent audit reports. C.A. App. 51, 117-118, 120.

b. Petitioner is the former controller of Greeneville's electric distribution system, the Greeneville Light and Power System (GLPS). Between 1977 and 1988, petitioner executed GLPS's annual financial statements as its "Accountant in charge of books," attesting in each case that Greeneville's "books of account have been kept in accordance with the provisions of the power contract." C.A. App. 118-119.

After his termination in 1988, petitioner commenced this action—in his own right and as a representative of a putative class of purchasers of power—against TVA, Greeneville, the members of GLPS's governing board, and two officers of GLPS.[2] The amended complaint asserts federal jurisdiction under 28 U.S.C. 1331. In essence, the complaint alleges that GLPS has failed to comply with the FERC accounting system prescribed by its contract with TVA; as a result of those accounting practices, the complaint continues, GLPS has overstated its expenses, understated its income, and charged its customers inflated prices for TVA power. See C.A. App. 21-33.

Relief is sought from TVA on two legal theories. First, the amended complaint alleges that petitioner and the members of the putative class are third-party beneficiaries of the TVA-Greeneville contract and that TVA has breached the contract "by failing to reduce power rates when [GLPS] had excess revenues, as the contract mandated." C.A. App. 25, 27. Second, the complaint seeks judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, of

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[2] Petitioner also filed suit in the United States District Court for the Eastern District of Tennessee against the Town of Greeneville and the superintendent of GLPS, seeking relief for his alleged wrongful termination. That suit, *Matthews* v. *Town of Greeneville*, No. CIV-2-88-468, is still pending.

TVA's allegedly unlawful failures to take action (1) "to fulfill the clear Congressional mandate that TVA power should be sold at the lowest rates feasible"; (2) to compel Greeneville to comply with the contractual provision requiring use of FERC's accounting system; (3) to reduce Greeneville's surplus revenues; and (4) to revise the resale rate schedules in the contract. C.A. App. 29-30. The complaint seeks $10 million in damages for petitioner and the putative class, a writ of mandamus, and other relief. *Id.* at 32-33, 37-38.

c. TVA and the other respondents moved to dismiss the action or for summary judgment. Pet. App. Aii. The district court granted summary judgment in favor of all respondents. Pet. App. Aiii-Axxiii. With respect to TVA, the court concluded that the actions over which petitioner sought APA review—TVA's allegedly unlawful failures to enforce various provisions of Greeneville's contract and to modify the contract's resale rate schedules—were unreviewable under 5 U.S.C. 701(a). Pet. App. Aix-Axv. The court declined to exercise pendent jurisdiction over the remaining state-law claims against the non-federal respondents. *Id.* at Axv-Axvii.

2. The court of appeals affirmed in an unpublished decision. The court noted that a "long line of precedent" establishes "that TVA rates are not judicially reviewable." Pet. App. Axxxi. Similarly, the court continued, petitioner could not obtain review of TVA's alleged "failure to ensure compliance with FERC guidelines." *Ibid.* The court explained that under *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985), "presumptively unreviewable," Pet. App. Axxxiv, and an agency's refusal to take enforcement action is it found nothing in the TVA Act that warranted a

departure from that general rule. To the contrary, the court explained, there is no language in the Act "requiring the TVA to take action if a provision in one of its contracts is not followed"; the Act "does not even require action by the TVA [if] there is evidence that electricity is not being provided at the lowest possible rates to consumers"; the Act "accords the TVA a great amount of discretion in its contractual relations with municipalities"; and the statute's "vague admonition to maintain 'the lowest possible rates' does not come close to providing the sort of guidelines which would permit meaningful judicial review." Pet. App. Axxxviii-Axxxix.

The court of appeals held that the district court did not have federal question jurisdiction over petitioner's claims against the remaining respondents and that it was not an abuse of discretion to relinquish pendent jurisdiction over those claims. Pet. App. Axl-Axliii.

ARGUMENT

1. Petitioner contends that the Administrative Procedure Act authorizes broad judicial review of the rate schedules in TVA's contract with Greeneville and of TVA's alleged failure to enforce the contract's terms. Pet. 33-47. As the lower courts held, however, those matters are "committed to agency discretion by law." 5 U.S.C. 701(a)(2). There is no conflict among the courts of appeals on that question, nor is there any other ground warranting this Court's review.

a. The TVA Act includes a broad declaration of the Act's policies regarding sales of surplus power. 16 U.S.C. 831j. One such policy is that sales to businesses and domestic and rural consumers should be structured so as to "permit domestic and rural use at the lowest possible rates and * * * encourage increased domestic and rural use of electricity." *Ibid.*

The question of how best to advance that policy, however, is expressly committed to TVA's judgment. TVA's Board is empowered (16 U.S.C. 831i (emphasis added)):

> to include in any contract for the sale of power such terms and conditions, including resale rate schedules * * * *as in its judgment may be necessary or desirable for carrying out the purposes of this chapter* * * *.

In *Webster* v. *Doe*, 486 U.S. 592, 600 (1988), this Court held that a statutory delegation of comparable breadth foreclosed APA review. Under the statute at issue in *Webster*, the Director of Central Intelligence has discretion to terminate a CIA employee "whenever [the Director] shall deem such termination necessary or advisable in the interests of the United States." 50 U.S.C. 403(c). This Court noted that this language "fairly exudes deference to the Director, and appears * * * to foreclose the application of any meaningful judicial standard of review." 486 U.S. at 600.[3] Based upon that language and the structure of the Act, the Court held that "Congress meant to commit individual employee discharges to the Director's discretion, and that § 701(a)(2) accordingly precludes judicial review of these decisions under the APA." *Id.* at 601.

The same reasoning applies to the provisions of the TVA Act at issue in this case. Under those provisions, the selection of the appropriate resale rate

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[3] Section 702(a)(2) forecloses judicial review when a statute "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler* v. *Chaney*, 470 U.S. at 830. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971).

schedule for a given distributor of TVA power is dependent upon TVA's "judgment" regarding what "may be necessary or desirable to carry out the purposes" of the Act. Petitioner's allegations that TVA has failed to reduce Greeneville's resale rates and has thereby violated the congressional policy favoring power sales at the lowest feasible rates challenge TVA's exercise of that judgment. Just as in *Webster*, however, it is clear that Congress intended TVA—and not the courts—to determine what rates would best serve the policies of the TVA Act.[4]

Congress's decision to commit ratemaking issues raised by sales of TVA power to the Authority's expert judgment is understandable. Resale ratemaking involves a number of business and financial considerations—including the distributor's current operating expenses, anticipated improvements to the system, the appropriate sources of financing for such improvements, predictions regarding upcoming economic conditions, the need for working capital and a healthy capital structure, and others. As the court of appeals recognized, "[t]he federal court system * * * cannot assume the role of a (quasi) public service commission for TVA ratepayers." Pet. App. Axl.[5]

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[4] Petitioner also relies on 16 U.S.C. 831n-4(f), which provides that TVA shall charge rates for power that are sufficient to generate revenues for specified purposes and "such additional margin as the Board may consider desirable," all with "due regard for the primary objectives of the [Act], including the objective that power shall be sold at rates as low as are feasible." By its terms, however, that provision applies to the rates that TVA charges distributors. TVA's wholesale rates are not at issue here. In any event, Section 831n-4(f)'s broad delegation of authority provides no basis for judicial review even of the rates to which it applies.

[5] See *Mobil Oil Corp.* v. *Tennessee Valley Authority*, 387 F. Supp. 498, 506 (N.D. Ala. 1974) ("The fixing of rates

As the court of appeals noted, the courts have repeatedly refused to review TVA's setting of rates for its electric power. *E.g.*, *Ferguson* v. *Electric Power Bd.*, 378 F. Supp. 787, 789 (E.D. Tenn. 1974), aff'd, 511 F.2d 1403 (6th Cir. 1975); *Carborundum Co.* v. *Tennessee Valley Authority*, 521 F. Supp. 590, 593 (E.D. Tenn. 1981), aff'd, 705 F.2d 451 (6th Cir. 1982); *Mobil Oil Corp.* v. *Tennessee Valley Authority*, 387 F. Supp. 498, 506 (N.D. Ala. 1974); *Allen* v. *Electric Power Bd.*, 422 F. Supp. 4, 6 (M.D. Tenn. 1976), appeal dismissed, No. 76-2678 (6th Cir. Sept. 21, 1978); *Consolidated Aluminum Corp.* v. *Tennessee Valley Authority*, 462 F. Supp. 464, 474 (M.D. Tenn. 1978).

b. Petitioner's amended complaint also seeks review of TVA's alleged failure to enforce provisions of the Greeneville contract. As the court of appeals held, any review of those alleged omissions is squarely foreclosed by *Heckler* v. *Chaney*, *supra*. In *Heckler*, the Court recognized a presumption against judicial review of an agency's refusal to take enforcement actions, setting forth a number of reasons why inaction of that sort is generally unsuitable for review. 470 U.S. at 831-832. To rebut that presumption, the party seeking review must demonstrate that "the substantive statute has provided guidelines for the

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which will balance and achieve all of these different objectives is a matter which Congress has entrusted to the judgment of the TVA Board, and which involves the clearest sort of commitment to agency discretion."). The courts have long recognized that TVA has been vested with broad discretion to achieve the congressionally declared objectives of the TVA Act. See *United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 552-554 (1946); *Hoke Co.* v. *Tennessee Valley Authority*, 854 F.2d 820, 825-826 (6th Cir. 1988).

agency to follow in exercising its enforcement powers." *Id.* at 833.

As the court of appeals found, the TVA Act does not supply any standards that courts could employ in reviewing the propriety of an alleged failure by TVA to enforce the terms of a particular contract. Indeed, since the TVA Act provides the Authority with unreviewable discretion to select the terms of its contracts with its distributors, the statute cannot fairly be construed to contemplate judicial oversight of enforcement of the terms chosen by TVA in the exercise of that discretion.

2. Petitioner also contends that he and the class he claims to represent should be allowed to pursue an action against TVA as third-party beneficiaries of the Greeneville contract. Pet. 31-33, 47-50.

The general principles governing such claims are well established. A plaintiff seeking to enforce a contractual promise as a third-party beneficiary must demonstrate that the contracting parties intended the promise to be enforceable for his direct benefit [6]—*i.e.*, that the parties intended to confer a right on the plaintiff to sue for a breach of the particular promise at issue.[7] Those requirements are enforced with particular rigor with respect to government contracts.

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[6] *E.g.*, *German Alliance Ins. Co.* v. *Home Water Supply Co.*, 226 U.S. 220, 230 (1912); *Tennessee Valley Authority* v. *Exxon Nuclear Co.*, 753 F.2d 493, 498 (6th Cir. 1985); *Beverly* v. *Macy*, 702 F.2d 931, 940 (11th Cir. 1983); *King* v. *National Indus., Inc.*, 512 F.2d 29, 32 (6th Cir. 1975); *Restatement (Second) of Contracts* § 302 (1979).

[7] *E.g.*, *Price* v. *Pierce*, 823 F.2d 1114, 1121 (7th Cir. 1987), cert. denied, 485 U.S. 960 (1988); *Nguyen* v. *United States Catholic Conference*, 719 F.2d 52, 55 (3d Cir. 1983); *Roberts* v. *Cameron-Brown Co.*, 556 F.2d 356, 362 (5th Cir. 1977); *Public Serv. Co.* v. *United States*, 5 Cl. Ct. 818, 820 (1984).

Because those contracts are often designed to serve some public purpose, it might often be said that a government contract was intended for the benefit of an indefinite number of people. In the context of such a contract, therefore, the courts have insisted on a very specific showing that the parties to the contract intended to provide for enforcement by third-party beneficiaries.[8]

Petitioner's claims that TVA may be held liable for breaches of the contract provisions that require Greeneville to employ FERC's accounting system and that provide for changes in the resale rate schedules fall far short of satisfying that requirement. There is no indication that the contract contemplates enforcement by non-parties of Greeneville's promise to employ FERC's accounting system; the obvious intention of that provision is to facilitate TVA's oversight of Greeneville's operations. In any event, a breach of that promise by Greeneville could not justify an award of any relief against TVA. With respect to provisions addressing rates, petitioner's fundamental contention is that TVA and Greeneville should have amended the contract to provide a lower rate schedule. The contractual provision providing for such modifications, however, is an "agreement to agree" admonishing the parties to take account of various

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[8] *Berberich* v. *United States*, 5 Cl. Ct. 652, 655-656 (1984), aff'd, 770 F.2d 179 (Fed. Cir. 1985); *Johnson Controls, Inc.* v. *United States*, 8 Cl. Ct. 359 (1985), aff'd, 795 F.2d 1011 (Fed. Cir. 1986); *Reiner* v. *West Village Assocs.*, 600 F. Supp. 233, 238-239 (S.D.N.Y.), aff'd, 768 F.2d 31, 32-33 (2d Cir. 1985); *Nguyen* v. *United States Catholic Conf.*, 548 F. Supp. 1333, 1348-1349 (W.D. Pa. 1982), aff'd, 719 F.2d 52, 55-56 (3d Cir. 1983); *Schell* v. *National Flood Insurers Ass'n*, 520 F. Supp. 150, 157 (D. Colo. 1981). See also *Restatement (Second) of Contracts* § 313 (1979).

judgmental considerations.[9] By its nature, that type of provision makes the parties responsible for modifications and leaves non-parties with no specific promise to enforce.

3. Petitioner also seeks further review of the dismissal without prejudice of his claims against the non-federal respondents. The court of appeals held that the court lacked subject matter jurisdiction over those claims and that the district court did not abuse its discretion when it relinquished pendent jurisdiction after dismissing TVA from the action. Pet. App. Axl-Axliii & n.5. Petitioner contends that his claims arise under federal law because he seeks enforcement of a contractual provision requiring Greeneville to employ FERC's accounting system. Pet. 50-54. The fact that the contract between TVA and Greeneville incorporates an accounting system devised by a federal agency does not suggest that petitioner's contract claims arise under federal law for purposes of 28 U.S.C. 1331. See *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U.S. 804 (1986).

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[9] As noted, the contract provides that if the rates set forth in the resale rate schedule "provide revenues that are more than sufficient" to operate Greeneville's system "on a self-supporting and financially sound basis," then TVA and Greeneville "shall agree upon a reduction in said rates and charges, and [Greeneville] shall promptly put such reduced rates and charges into effect." Similarly, a provision obligating Greeneville to use its revenues to pay for operating expenses, debt service, new construction, and other purposes benefiting the system provides that "resale rates and charges shall be reduced from time to time to the lowest practicable levels considering such factors as future circumstances affecting the probable level of earnings, the need or desirability of financing a reasonable share of new construction from * * * surplus revenues, and fluctuations in debt service requirements." C.A. App. 41-43.

4. Finally, petitioner contends that the district court should not have acted on the respondents' motions for summary judgment without first allowing petitioner to take certain discovery. Pet. 55-58. Since petitioner's claims are insufficient as a matter of law, however, the requested discovery was immaterial and unnecessary. See Pet. App. Axlii n.5. In any event, the correctness of the district court's discretionary ruling presents no question calling for this Court's review, and petitioner waived his right to seek appellate review when he failed to make a timely objection to the magistrate's order staying discovery. See Fed. R. Civ. P. 72(a); *Thomas* v. *Arn*, 474 U.S. 140 (1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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